

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Request**

to Depose  
CPT Keith Petty, USA

21 July 2008

**1. Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.

**2. Relief Requested:** The defense respectfully requests that this Military Commission order the deposition of CPT Keith Petty, USA, by the defense.

**3. Burdens of Proof and Persuasion:** “[T]he military judge may order that a deposition be taken on request of a party.” R.M.C. 702(b). “A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.” R.M.C. 702(a). As the requesting party, the defense carries the burden of establishing that a deposition is warranted. Pursuant to R.M.C. 702(c)(3)(A) the military judge may only deny a request for deposition “for good cause, e.g., to protect classified information, sources, methods and means of acquiring intelligence, subject to review by the military judge.” The discussion to this rule further provides that “Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness’ testimony, or that the witness’ testimony would be unnecessary. The fact that a witness will be available for trial is good cause for the denial in the absence of unusual circumstances, such as when the government has improperly impeded defense access to a witness.” R.M.C. 702(c)(3)(A), Discussion.

**4. Facts:**

a. On 24 March 2008, the defense submitted a supplemental request for discovery requesting production of, *inter alia*, the Church Report and Schmidt-Furlow Report. (Def. Supplemental Discovery Request, 24 Mar 08 (attachment A to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously).) The Church and Schmidt-Furlow Reports are classified Department of Defense (“DoD”) investigations into detainee treatment. The Schmidt-Furlow Report relates specifically to allegations of detainee abuse at JTF-GTMO.<sup>1</sup> And the Church Report relates to interrogation operations in Guantanamo Bay, Afghanistan and Iraq. The defense request stated that the

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<sup>1</sup> An unclassified “executive summary” of the report is available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>.

defense believed that the reports were documents “material to the preparation of the defense” within the meaning of R.M.C. 701. (*See id.*)

b. On 7 April 2008, the prosecution responded to the defense request, indicating that the prosecution had obtained the reports and that the prosecution was “reviewing them for any responsive information.” (Govt. Resp. to Def. Supplemental Discovery Request, 7 Apr 08 (attachment B to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously).) The prosecution subsequently informed the defense that it would make the Church and Schmidt-Furlow Reports available (in their entirety) on the condition that defense counsel review them in the Office of the Chief Prosecutor (“OCP”) offices in Crystal City. They were two of a number of documents that the prosecution required defense counsel to examine in the prosecution’s Crystal City offices, rather than provide the defense with its own copy. On one occasion the defense was required to review the documents in the spaces of OCP personnel, making confidential discussions about the documents impossible. (Kuebler email of 28 Apr 08 at para. 2 (attachment C to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously).)

c. Over the next several weeks, defense counsel reviewed the materials to which it had been provided access by the prosecution. During one of these visits, defense counsel inquired into why the defense could not be provided with copies of the Church and Schmidt-Furlow Reports. Assistant Trial Counsel, Captain Keith Petty, indicated that it was “our policy” (referring either to OCP or the Khadr prosecution team) to make them available on those terms.

d. Since the prosecution did not permit the defense to have its own copy of several documents, in order to use the materials in connection with litigation, the prosecution invited the defense to “tab” pages of various documents the defense needed to use in connection with filings. The defense informed the prosecution that it intended to use portions of the Church and Schmidt-Furlow Reports in connection with discovery motions pending before the Commission and asked the prosecution to bring the tabbed copies of the reports to GTMO in connection with the 18 June 2008 session of the Commission. The prosecution agreed, but did not bring the documents.

e. The “Tiger Team SOP” is an attachment to the Schmidt-Furlow Report. The Tiger Team SOP is a standard operating procedure for JTF-GTMO interrogators, initially issued in January 2003. On or about 8 June 2008, Detailed Defense Counsel, LCDR Kuebler, executed an affidavit, intended to be filed in connection with *al Odah v. United States*, No. 06–1196 (petition for certiorari granted 29 June 2007), for which Mr. Khadr was a respondent in support of petitioner and which was then pending before the U.S. Supreme Court, together with *Boumediene v. Bush*, No. 06-1195. (Kuebler Aff. (attachment D to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously).) The affidavit related to the Supreme Court certain unclassified provisions of the Tiger Team SOP relevant to questions then before the Court. (*Id.*)

f. Following news reports about the affidavit and Tiger Team SOP, the prosecution informed the defense that prosecutors had been told that they lacked “authorization” to provide the defense with access to the reports. They indicated that persons outside the OCP had

expressed “consternation” over the release. Accordingly, the defense was not permitted to make copies of even the tabbed pages of the Schmidt-Furlow Report for use in connection with its motions. After defense counsel expressed a desire to take notes of the contents of the report and provide their notes to the Commission, the prosecution informed the defense that introduction of notes was not “authorized” either. The prosecution told the defense that it may be able to obtain “appropriate authorization” to provide the defense copies of the report in the future, but that authorization would not be received in time for the hearing. As a result, the defense was not permitted to offer matters from the Schmidt-Furlow Report in connection with its motion to compel production of Analyst Support Packages. Over defense objection to the Commission considering the motion until it could offer into evidence portions of the Schmidt-Furlow Report, the Commission denied this motion on 20 June 2008. (*See* Ruling on D060.)

g. During a conversation about the issue with defense counsel while in GTMO before the 19 June 2008 session of the Commission, the prosecution again stated that it had been in contact with the DoD General Counsel’s office concerning the Schmidt-Furlow Report and that it lacked “authorization” to allow the defense to use the document in connection with Commission motions. The prosecution indicated that the report was one of a number of classified documents provided to the OCP by various agencies and subject to a “gentleman’s agreement” whereby the prosecution agreed to “coordinate” with the agency before disclosing it to the defense in the course of discovery. The prosecution indicated that the OCP had essentially been required to enter into this agreement in order to obtain access to materials in the possession of U.S. government agencies within the scope of the government’s discovery obligations. According to MAJ Groharing, under the provisions of the “agreement,” the way “the process is supposed to work” the defense makes its showing as to why certain information is “material” and then the prosecution takes that information to the relevant agency before deciding how to respond. According to prosecutors, in this case, they had been told that they had gotten “out in front” on producing the information (i.e., the Schmidt-Furlow Report) in an effort to “lean forward” in facilitating the process of discovery.

h. The Schmidt-Furlow Report is classified “secret.” It is not marked “originator controlled,” nor is it marked with any other caveat or condition on its dissemination. The defense believes that the “original classification authority” of the document (i.e., its owner) is the U.S. Central Command (“CENTCOM”).

i. On 19 June 2008, the Commission granted a defense motion to compel production of detention facility SOPs. In an e-mail dated 1 July 2008 (after the prosecution had already missed a ten-day, Commission-imposed deadline for production of the documents), the prosecution indicated that its “authority to release” the SOPs was “contingent” upon obtaining a protective order, which the prosecution had requested the day before, suggesting that someone had directed the prosecution not to release the documents to the defense notwithstanding the existence of an order of this Commission to do so. When asked to identify the individuals who had so directed the prosecution not to comply, the prosecution declined to provide the requested information. (*See* Kuebler email string of 7 Jul 08 (attachment E to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously); Petty e-mail string of 7 Jul 08 (attachment F to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously).)

## 5. Argument

### a. **The Defense Has a Right to Depose Material Witnesses Pretrial Absent Good Cause for Denying the Deposition Where the Deposition is in the Interest of Justice**

(1) R.M.C. 702(a) provides that “A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.” To obtain a deposition, the requesting party must provide the following:

- (A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;
- (B) A statement of the matters on which the person is to be examined;
- (C) A statement of the reasons for taking the deposition; and
- (D) Whether an oral or written deposition is requested.

R.M.C. 702(c)(2).

(2) The defense right to interview a material witness is “unconditional.” *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980). R.M.C. 701(j) provides that each “party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.” It has been held that it is reversible error to prevent the defense from interviewing a material witness before trial. *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976). “[B]road discovery contributes substantially to the truthfinding process and to the efficiency with which it functions. It is essential to the administration of military justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.” *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986).

(3) Accordingly, the military judge may only deny pre-trial depositions for “good cause.” When a witness is shown to have both information relevant to the defense “and he refuses to talk to defense counsel, there usually will be lacking any ‘good cause’ to forbid his deposition.” *Killebrew*, 9 M.J. at 161.

### b. **Showing Required Under R.M.C. 702(a)**

(1) With respect to R.M.C. 702(c)(2)(A), defense counsel seeks to depose CPT Petty. The defense is unaware of his home address, but knows that CPT Petty can be contacted at the Office of the Chief Prosecutor, Office of the Military Commissions, in Crystal City, Virginia.

(2) With respect to R.M.C. 702(c)(2)(B), defense counsel intends to investigate the circumstances surrounding restrictions on its access to the Church and Schmidt-Furlow Reports, the interrogation SOPs ordered by the military judge and other evidence. These include the terms of the “gentleman’s agreement” that governs trial counsels’ production of evidence, the individuals with whom this agreement was made, the means by which this agreement has been enforced, the identities of individuals in the Office of the General Counsel for the Department of Defense and other government departments and agencies who have been involved in imposing restrictions on trial counsel’s disclosure of evidence to the defense, and specific instances when trial counsel have refused disclosure pursuant to this “gentleman’s agreement.”

(3) With respect to R.M.C. 702(c)(2)(C), the defense requires a deposition to clarify a number of outstanding questions that are needed before the hearing scheduled on 13 August 2008, including the identity of additional witnesses to testify on the unlawful influence motion addressing the Church and Schmidt-Furlow Reports.

(i) Of particular importance given trial counsel’s refusal to disclose any of its communications with DoD OGC, is the identity of the parties to this “gentleman’s agreement” and the identity of the individuals who instructed trial counsel to claw back the Church and Schmidt-Furlow Reports. These will be material witnesses in the hearing of the defense’s motion, and trial counsel have refused to disclose their names so that they can be contacted and/or called to testify before the military commission.

(ii) As is laid out in the defense motion, based upon trial counsels’ current characterization of this “gentleman’s agreement,” trial counsel defer to instructions from third parties as to what position they will take on the materiality of a given piece of evidence. The instances in which this agreement has been enforced speak directly to the extent of prejudice Mr. Khadr will have suffered as a result of this unlawful influence. Defense counsel, therefore, require the opportunity to know before hand what evidence this “gentleman’s agreement” has tainted in order to compile an accurate picture of the prejudice this has caused.

(iii) It is also imperative that defense counsel understand how this “gentleman’s agreement” was enforced prior to the hearing. This will be necessary to demonstrate the particular nature of the unlawful influence and to find analogous authorities that can provide the military judge with a guide in determining the appropriate remedy.

(4) With respect to R.M.C. 702(c)(2)(D), defense counsel requests an oral deposition.

**c. A Deposition of CPT Petty is in the Interests of Justice Because It is Essential for the Defense to Adequately Prepare for Trial**

(i) As stated in paragraph 5(h), *supra*, the defense sought and was refused responses from trial counsel as to the names of the people in the General Counsel’s office who instructed trial counsel to claw back defense counsels’ access to the Church and Schmidt-Furlow Reports.

(ii) The discussion of R.M.C. 702 specifically contemplates the deposition of prospective witnesses when “the Government has improperly impeded defense access to a witness.” R.M.C. 702(c)(3)(A), Discussion. In response to a request to trial counsel to “identify the person (or persons) who directed you not to comply with the Commission’s production order,” CPT Petty responded “At this time we decline to entertain the below request.” (Petty e-mail string of 7 Jul 08 (attachment F to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously).) This was consistent with another request seeking trial counsels’ correspondence with DoD GC respecting disclosure of the Schmidt-Furlow report to which CPT Petty responded “We do not intend to release any communications between OMC-P and DoD OGC.” (Petty e-mail string of 7 Jul 08 (attachment E to Def. Mot. to Dismiss due to Unlawful Influence (Church & Schmidt-Furlow Reports) filed contemporaneously).)

(iii) CPT Petty is an officer of the United States Army and an employee of the U.S. government. This “gentleman’s agreement” was made in trial counsels’ official capacity and is directly related to the integrity of the truth finding process by this military commission. His refusal to divulge information to the defense pertaining to available witnesses and their communications with third parties, directly and improperly interferes with the defense’s ability to access witnesses and prepare an adequate defense in support of its motion. A deposition of CPT Petty is therefore necessary for compiling a complete record of the unlawful influence and the impact it has had on the discovery process.

#### **d. Conclusion.**

(1) It is in the interest of justice to grant the defense’s request to depose CPT Petty. He is in possession of material evidence that goes to prove a systematic practice of unlawful influence over trial counsels’ professional judgment in matters related to discovery. His knowledge of this unlawful procedure as well as the key players involved is necessary to the defense’s ability to provide the military judge with all of the facts necessary to adequately protect the Commission, Mr. Khadr and the public’s interest in a trial free of corruption and third-party influence.

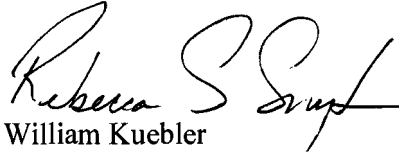
**7. Oral Argument:** The defense hereby waives oral argument to which it is otherwise entitled to pursuant to R.M.C. 905(h). The defense does this so that the motion can be resolved expeditiously as requested in paragraph 10 below.

**8. Witnesses and Evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution’s response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

**9. Certificate of Conference:** The defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

**10. Additional Information:** The defense respectfully requests that the Military Judge grant the instant request as expeditiously as possible in order to allow the defense to conduct the deposition in time to request additional witnesses (if necessary) in connection with the currently-scheduled 13 August 2008 session of the Commission. If the prosecution is afforded the

opportunity to respond, the defense requests that they be required to respond NLT 1700, 22 July 2008, and that a ruling issue as soon thereafter as possible. In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

A handwritten signature in black ink, appearing to read "William Kuebler", written in a cursive style.

William Kuebler  
LCDR, USN  
Detailed Defense Counsel

Rebecca S. Snyder  
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR  
a/k/a “Akhbar Farhad”  
a/k/a “Akhbar Farnad”  
a/k/a “Ahmed Muhammed Khali”

D-073

GOVERNMENT’S RESPONSE

To the Defense’s Request to Depose  
Captain Petty

28 July 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge’s scheduling order of 19 June 2008.

2. **Relief Requested:** The Government respectfully requests that the Military Judge deny the Defense request.

3. **Overview:** The Defense has provided scant justification for ordering the extraordinary relief requested. Ordering a deposition under these circumstances is not supported by the Military Commissions Act (“MCA”) or the Manual for Military Commissions (“MMC”). The Defense request should be denied.

4. **Burden of Persuasion:** As the requesting party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).<sup>1</sup>

5. **Facts:** The following facts supplement or clarify assertions contained in the Defense motion:

6. **Discussion:**

a. The attached Defense request is taken largely verbatim from the D072 – Defense Motion based on alleged unlawful influence. The Government response to D072 addresses many of the factual allegations listed in the Defense Motion and explains the coordination procedures followed by the Prosecutors assigned to the Office of the Chief Prosecutor and attorneys at the Department of Defense Office of General Counsel when reviewing defense requests for discovery or declassification of Department of Defense documents or information.<sup>2</sup>

b. As stated in the Government response to D072, all of the actions taken by

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<sup>1</sup> RMC 702(a) provides that a deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case if it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.

<sup>2</sup> Rather than repeat our previous response, the Government hereby incorporates its response to D072 in this response.



Prosecutors assigned to the Office of the Chief Prosecutor and members of the Department of Defense Office of General Counsel were authorized by and consistent with the MCA, the MMC, and well established principles of military jurisprudence. None of the actions amounted to unlawful influence over the proceedings of this Commission and/or the professional judgment of trial counsel.

**Deposition of Captain Petty is not required**

c. A deposition may only be ordered when, due to exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission. RMC 702(a). Those exceptional circumstances are clearly not present in the instant case.

d. The Defense request provides little, if any, justification to warrant the extraordinarily unusual remedy of deposing a counsel regarding a case to which the counsel has been detailed. The defense request states that defense counsel “intends to investigate the circumstances surrounding restrictions in its access to the Church and Schmidt-Furlow Reports, the interrogation SOPs ordered by the military judge and other evidence,” “to clarify a number of outstanding questions that are needed before the hearing scheduled on 13 August 2008, including the identity of additional witnesses to testify on the unlawful influence motion addressing the Church and Schmidt-Furlow reports,” and to have “the opportunity to know before hand what evidence this ‘gentlemen’s agreement’ has tainted in order to compile an accurate picture of the prejudice this has caused.” Defense motion at 5.

e. The Defense request relies on the premise that certain individuals have been involved in imposing restrictions on trial counsel’s disclosure of information to the defense. Contrary to the Defense motion, trial counsel do not defer to instruction from third parties as to what position they will take on the materiality of a given piece of evidence. As discussed at length in the Government response to D072, no one has ever told the Prosecution what was or was not material to the preparation of the defense. The “gentlemen’s agreement” referenced in the defense filing only requires coordination with the Department of Defense Office of General Counsel and other relevant Department of Defense components prior to release of documents or information to defense counsel or an accused unlawful enemy combatant. No member of the Department of Defense Office of General Counsel has directed or requested the Prosecution not to comply with a defense discovery request if the Prosecution believes it is required under the Military Commissions Act. This coordination allows the Government to review effectively requests and assess whether additional protective orders are necessary prior to discovery of materials, whether a substitution of the requested information needs to be provided consistent with MRE 701(f) and MCRE 505(e), or whether an equity holder intends to assert a privilege over the requested information.

f. RMC 702 provides that a request may be denied for “good cause.” Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness’ testimony, or that the witness’ testimony

would be unnecessary.<sup>3</sup>

g. Good cause exists to deny this meritless request. The Defense proffer fails to state a proper ground for taking a deposition, demonstrate the probable relevance of Captain Petty's testimony, or establish that his testimony would be necessary. Captain Petty's testimony would only reiterate what is already included in the Government response to D072 and would provide no useful information that would assist the Military Commission in deciding the pending Defense motion. If the defense believes the Government has wrongly withheld information pursuant to a Defense discovery request, they should file an appropriate motion to compel discovery, not a motion to compel the deposition of a trial counsel. Conducting a deposition will only further waste the parties' time dealing with this issue and squander limited government resources.

7. **Oral Argument:** This motion is wholly meritless and should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

8. **Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.

9. **Certificate of Conference:** Not applicable.

10. **Additional Information:** None.

11. **Submitted by:**

//original signed//  
Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Prosecutor

Keith A. Petty  
Captain, U.S. Army  
Assistant Prosecutor

John F. Murphy  
Assistant Prosecutor  
Assistant U.S. Attorney

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<sup>3</sup> RMC 702(c)(3)(A), Discussion.